

**DEPARTMENT OF STATE REVENUE
SUPPLEMENTAL LETTER OF FINDINGS: 05-0177
Use Tax for the Years 2001 through 2003**

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ISSUE

I. Advertising Materials—Use Tax

Authority: IC 6-2.5-3-2; IC 6-2.5-3-1; IC 6-2.5-3-5(a); KRS 139.200(1).

Taxpayer challenges the audit's decision imposing Indiana use tax on the cost of various advertising materials purchased by Taxpayer in Kentucky for use within Indiana.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation organized to operate a franchise restaurant located in Indiana. Taxpayer is co-owned by an Indiana resident and by a Kentucky resident. The Department conducted an audit review of Taxpayer's business records. The audit review resulted in the assessment of additional Indiana use tax. Taxpayer disagreed with the assessment and lodged a protest to that effect. Declining the opportunity to take part in an administrative hearing on the matter, taxpayer agreed to permit resolution of the protest based upon the contents of its written submission to the Department. The Letter of Findings denied Taxpayer's protest. Taxpayer requested a rehearing, citing additional evidence not available at the time of the hearing: a Technical Ruling on coupon printing issued by the Kentucky Department of Revenue. A rehearing was held and this Supplementary Letter of Findings is issued.

DISCUSSION

I. Advertising Materials—Use Tax.

The Department's audit concluded that Taxpayer owed use tax on the price of advertising materials destined for use within Indiana. Taxpayer disagreed.

The restaurant franchisor prepared advertising materials suitable for use by its individual franchisees. Taxpayer—as one of the individual franchisees—took advantage of these materials, using them to promote Taxpayer's Indiana business.

In Taxpayer's case, the franchisor's support service shipped the materials to a Kentucky mail service. According to Taxpayer, "The title of these inserts is assumed by [Taxpayer] or its designee in Kentucky. The mailer then adds the coupons/flyers to its other inserts and mails them

to various locations in the state of Indiana.” Taxpayer pays franchisor for the cost of the advertising materials. The audit based the use tax assessment on the cost of the advertising materials delivered into Indiana.

Taxpayer pointed out that it remitted Kentucky sales tax each time it paid an invoice for the advertising materials. Taxpayer contends that the proposed assessment of Indiana use tax “would result in double taxation at the Indiana franchisee level and would appear to violate the fundamental constitutional principals against double taxation.”

Indiana imposes a use tax on the “storage, use, or consumption of tangible personal property in Indiana . . . regardless of the location of that transaction or of the retail merchant making that transaction.” IC 6-2.5-3-2. The tax is imposed on transactions that occur outside of Indiana that would be taxable if they occurred within Indiana but only if property is stored, used or consumed in Indiana. IC 6-2.5-3-1. However, IC 6-2.5-3-5(a) provides:

A person is entitled to a credit against the use tax imposed on the use, storage, or consumption of a particular item of tangible personal property equal to the amount, if any, of sales tax, purchase tax, or use tax paid to another state, territory, or possession of the United States for the acquisition of that property.

Taxpayer paid sales tax to Kentucky, for which Taxpayer has no recourse for a claim of refund. The Kentucky Department of Revenue issued to Taxpayer a Technical Ruling on coupon printing. The ruling outlined the transactions. Coupons are printed in Kentucky and then are mailed to a third-party sorting facility in Kentucky hired by Taxpayer. The franchisor bills Taxpayer for the coupons, adding to the price 6 percent Kentucky sales tax. Kentucky determined in the Ruling that title passed to Taxpayer in Kentucky when the coupons were sent from the franchisor to the third-party sorting facility for mailing. Because title had passed in Kentucky, the delivery of tangible personal property occurred in Kentucky and Kentucky sales tax was correctly levied and collected, pursuant to KRS 139.200(1).

The State of Indiana may pursue collection of use tax but must give credit to Taxpayer for sales tax properly paid to Kentucky. The imposition of use tax without credit would subject Taxpayer to double taxation. Taxpayer has provided approximately 25 original invoices indicating that it paid Kentucky sales tax on the purchase of the advertising materials sent into and used in Indiana. To the extent the Taxpayer asserts it is entitled to a credit against the Indiana use tax assessment, the Department concurs.

FINDING

For the reasons stated above, the Department sustains Taxpayer’s protest.